IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No.120 of 1991

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RATANSINH DURSINH RATHOD

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 120 of 1991

MR CB GUPTA for MR BM GUPTA for Appellant

MR IM PANDYA, APP for Respondent

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL

Date of decision: 28/12/2004

ORAL JUDGEMENT

Instant appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973 ("the Code" for short) is directed against judgment dated February 22, 1991 rendered by the learned Sessions Judge, Sabarkantha at Himatnagar, in Sessions Case No.2 of 1990 by which the appellant is convicted under Sections 325 and 498-A of the Indian Penal Code ("IPC" for short), and sentenced to suffer R.I. for forty-two months and fine of Rs.500=00,

in default, R.I. for two months, for commission of offence punishable under Section 325 IPC as well as R.I. for two years and fine of Rs.500=00, in default, R.I. for two months for commission of offence punishable under Section 498-A IPC. It may be mentioned that the learned Judge has directed that the substantive sentences shall run concurrently.

2. Deceased Baijiba was married to the appellant. The appellant and the deceased were working as agricultural labourers in the field of one Nathabhai Master of Prantij and were residing in the field itself with brother and wife of the brother of the appellant. However, father-in-law and mother-in-law of Baijiba were staying in their native village Anodiya. On July 12, 1989, Baijiba went to village Anodiya to meet and take care of her father-in-law and mother-in-law. After reaching village Anodiya, she stayed overnight there and returned to Prantij on July 13, 1989. On return she joined labour work in the field of Nathabhai Master along with the appellant and others. However, late coming to Prantij by the deceased from village Anodiya was not approved by the appellant. The appellant, therefore, started giving abuses to her, and after picking up a stick, dealt blows on her head as well as on both the legs and arms. The appellant also caused injuries on back of the deceased. Because of the injuries sustained by her, the deceased started bleeding and fell down on the ground. She was removed to M.C. Hospital at Prantij where she informed Dr.Sukumar, who was on duty, that she was assaulted by the appellant. Dr.Sukumar, in turn, informed Mr.Nagjibhai Jivaji, who was P.S.O. of Prantij Police Station. After entering the information conveyed by Dr.Sukumar in station diary, P.S.O. Nagjibhai asked Head Constable Khumansing to inquire into the matter. Head Constable Khumansing went to the Hospital and recorded statement of injured Baijiba. On the basis of statement of injured Baijiba, offences under Sections 323, 504 IPC and Section 135 of the Bombay Police Act were registered against the appellant. Constable Khumansinh also recorded statements of other witnesses and sent a yadi to Executive Magistrate to record dying declaration of the injured. As Baijiba had sustained serious injuries, she was shifted to Himatnagar Hospital for better treatment. On July 17, 1989, she was removed from the Civil Hospital Himatnagar against medical advice and admitted to a private Nursing Home namely, Sarvoday Surgical Hospital of Dr.C.S.Patel. Dr.Patel found that it was not possible for him to treat injured Baijiba and, therefore, he advised the relatives of Baijiba to remove her to Civil Hospital, Ahmedabad, for better treatment.

Accordingly, Baijiba was removed to V.S.General Hospital for further treatment. During the course of treatment, Baijiba succumbed to her injuries on July 23, 1989 and, therefore, offence punishable under Section 302 IPC was registered against the appellant. Thereafter, inquest on dead body of the deceased was held and arrangements were made for postmortem examination of the dead body. Further investigation into the case was conducted by P.S.I. Mr.Vankar of Prantij Police Station. During the course of investigation by PSI Mr.Vankar, statements of those persons, who were found to be conversant with the facts of the case, were recorded. On July 25, 1989, the appellant surrendered before the Police at Prantij and was arrested. While in police custody, the appellant made disclosure statement pursuant to which, stick used by him in commission of offence was recovered. The incriminating articles seized during the course of investigation were sent to Forensic Science Laboratory for analysis. On completion of the investigation, the appellant was chargesheeted in the Court of learned Judicial Magistrate First Class, Prantij, for commission of offences punishable under Sections 302 and 504 IPC. As the offence punishable under Section 302 IPC is exclusively triable by a Court of Sessions, the case was committed to the Sessions Court, Sabarkantha at Himatnagar, where it was numbered as Sessions Case No.2 of 1990.

3. Necessary charge against the appellant was framed at Exh.2. It was read over and explained to him. He pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Dr.Bharatkumar Shambhubhai Patel as P.W.-1 at Exh.7; (2) Dr.Sukumar Dhirubhai Sheth as P.W.-2 at Exh.12; (3) Vasantkumar Mithalal Soni as P.W.-3 at Exh.15; (4) Manjiben Galabsinh as P.W.-4 at Exh.20; (5) Lilachand Mohanlal Sathwara as P.W.-5 at Exh. 26; (6) Bhagwandas Mohanlal as P.W.-6 at Exh.28; (7) Himatsinh Kunvarsinh as P.W.-7 at Exh.31; (8) Dr.Chimanbhai Sankabhai as P.W.-8 at Exh.32; (9) Dr.Harshaben Mafatlal Patel as P.W.-9 at Exh.37; (10) Nagjibhai Jivaji as P.W.-10 at Exh.41; (11) Khumansinh Vakhatsinh as P.W.-11 at Exh.43; and (12) Dalpatsinh Karshanbhai Vankar as P.W.-12 at Exh.46, to prove its case against the appellant. The prosecution also produced documentary evidence such as certificate of injury sustained by Baijiba and issued by Dr.Bharatkumar at Exh.11; yadi sent by Police for recording dying declaration of Baijiba at Exh.16; panchnama of place of incident at Exh.21; panchnama indicating arrest of the appellant at Exh.22; inquest report at Exh.23; panchnama of person of Baijiba prepared at the hospital at Exh.24;

map of place of incident at Exh.25; panchnama indicating discovery of club pursuant to disclosure statement made by the appellant at Exh.27; dying declaration of Baijiba at Exh.30; postmortem notes of Baijiba at Exh.40; entry made in Register wherein particulars fit to be noticed or marked noteworthy are entered into at Exh.42; complaint of deceased Baijiba at Exh.45; report of Serologist etc. in support of the its case against the appellant.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellant the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement as required by Section 313 of the Code. In his further statement, it was admitted by the appellant that on July 13, 1989, Baijiba had visited village Anodiya. However, his defence was that a false case was registered against him and he was innocent. It is relevant to note that no defence evidence was adduced by the appellant to substantiate his defence.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that the commission of offence punishable under Section 504 IPC was not proved. However, the learned Judge held that there was sufficient evidence on record to prove that the appellant had subjected the deceased to cruelty and was liable to be convicted under Section 498-A IPC. It was also held by the learned Judge that on July 13, 1989 between 11.00 a.m. and 12.00 noon, the appellant had assaulted Baijiba by means of stick and caused grievous injuries to her as a result of which, he was liable to be convicted under Section 325 IPC. The learned Judge further deduced that it was not proved by the prosecution that the appellant had committed murder of the deceased and, therefore, was not liable to be convicted under Section 302 IPC. In view of abovereferredto conclusions, the learned Judge has convicted the appellant under Sections 325 and 498-A IPC, and imposed sentences referred to above, by judgment dated February 22, 1991, giving rise to instant appeal.

6. Mr.Chandrashekhar B.Gupta, learned counsel of the appellant, contended that no evidence worth the name has been adduced by the prosecution to establish that the appellant had subjected the deceased to cruelty and, therefore, unwarranted conviction of the appellant under Section 498-A IPC should be set aside by this Court. It was fairly admitted by Mr.Gupta, learned counsel of the appellant, before this Court that the case of the prosecution for commission of offence by the appellant punishable under Section 325 IPC is made out, but it was

urged that the appellant is ready to pay compensation of Rs.50,000=00 to Ms.Gangaben Kunvarji Chauhan, who is mother of the deceased, and having regard to the facts of the case and more particularly to the age, character and antecedents of the appellant, benefit of release on probation of good conduct as contemplated by Section 360 of the Code should be granted to the appellant.

7. Mr.I.M.Pandya, learned Additional Public Prosecutor, contended that the conviction of the appellant under Section 498-A IPC cannot be regarded as illegal in view of the evidence adduced by the prosecution and, therefore the said conviction should be upheld by this Court. As far as commission of offence punishable under Section 325 IPC is concerned, it was submitted by the learned Additional Public Prosecutor that having regard to the passage of time and in view of the willingness shown by the appellant to pay compensation to mother of the deceased, this is a fit case wherein benefit of release on probation of good conduct should be accorded to the appellant.

8. This Court has heard Mr.C.B.Gupta, learned counsel of the appellant, and Mr.I.M.Pandya, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

9. The first question which falls for consideration of the Court is, whether commission of offence punishable under section 498-A IPC by the appellant is made out or not. Section 498-A IPC reads as under:

> "498-A. Husband or relative of husband of a woman subjecting her to cruelty.- Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine."

A bare reading of the above quoted provision makes it evident that whoever being a husband or relative of husband of a woman subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation to Section 498-A defines "cruelty" to mean any willful conduct which is of a nature as is likely to

drive the woman to commit suicide or to cause grave injury or danger to life, limb or health; whether mental or physical of the woman; or harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand. As far as instant case is concerned, there is no evidence showing any friction between the appellant and the deceased and everything was cordial till the incident took place. The expression "cruelty" postulates such treatment as to cause reasonable apprehension in the mind of the wife that her living with the husband will be harmful and injurious to her life. What is relevant to notice is that every act of cruelty or harassment is not made a crime under Section 498A. In order to succeed, the prosecution has to establish that cruelty or harassment was unabated, incessant and persistent by the appellant. No such evidence is adduced by the prosecution to establish its case under Section 498A IPC. The only thing which is established by the prosecution is that late return of the deceased to Prantij had annoyed the appellant as a result of which the appellant had beaten the deceased. Under the circumstances, the conviction of the appellant under Section 498-A IPC cannot be considered as well-founded and is liable to be set aside.

10. As far as conviction of the appellant under Section 325 IPC is concerned, the learned counsel of the appellant has fairly conceded before this Court that the conviction of the appellant is well founded and is based on reliable evidence adduced by the prosecution. On re-appreciation of evidence adduced by the prosecution, this Court finds that the dying declaration proved by Dr.Sukumar Sheth examined at Exh.12; dying declaration proved by the Executive Magistrate Mr.Soni, who is examined at Exh.15; complaint of the deceased, which must be treated as her dying declaration and which is proved by Khumansinh Vakhatsinh who is examined at Exh.43; establish satisfactorily commission of offence by the appellant under Section 325 IPC. It is relevant to note that the appellant had assaulted the deceased with a thick short stick and caused grievous injuries. Under the circumstances, conviction of the appellant under Section 325 IPC cannot be regarded as illegal.

11. This brings the Court to consider the question whether the appellant should be accorded benefit of Section 360 of the Code. From the record of the case, it is evident that by this time, the appellant has undergone

imprisonment of forty-seven days. The appellant is on bail and the learned Additional Public Prosecutor, who has taken instructions from the Police Officer concerned in the matter, has not been able to point out to the Court that anything adverse was reported against the appellant while on bail. The appellant has shown willingness to pay compensation of Rs.50,000=00 to Ms.Gangaben Kunvarji Chauhan, who is mother of victim Baijiba. In Hari Kishan v. Sukhbir, A.I.R. 1988 SC 2127, the Supreme Court has emphasised that power to award the compensation to victim of offence should be liberally exercised by the Court to meet ends of justice. Sentencing the appellant to custody after a lapse of long time is not likely to serve any of the purposes of punishment. The learned counsel of the appellant, on instructions of the appellant who is personally present in the Court, has stated at the Bar that the appellant was released on bail by the High Court vide order dated March 7, 1991 and that while on bail, he has married Ms.Kumanben and that during the subsistence of marriage, Kumanben has given birth to two children. Having regard to the age, character, antecedents and the circumstances in which the offence was committed as well as readiness shown by the appellant to pay compensation of Rs.50,000=00 to the mother of the victim, it appears to this Court that it is expedient that the appellant should be released on probation of good conduct instead of sending him to jail. Thus, this Court is of the opinion that while maintaining the conviction of the appellant under Section 325 IPC and sentence imposed therefor, he should be accorded benefit of probation as contemplated by Section 360 of the Code.

12. Ms.Gangaben Kunvarji Chauhan is present in the Court with her son Mr.Sehuji Kunvarji Chauhan. They have been brought to the Court pursuant to the intimation given by the learned Additional Public Prosecutor to Prantij Police Station. Ms.Gangaben is accompanied by Police Constable Vasantbhai Kalabhai Solanki of Prantij Police Station. She has been identified by the appellant as well as the Police Officer. The appellant has handed over a sum of Rs.50,000=00 (Rupees Fifty Thousand Only) to Ms.Gangaben Kunvarji Chauhan in presence of the learned advocates of the parties. Ms.Gangaben Kunvarji Chauhan, who is accompanied by her son Mr.Sehuji Kunvarji Chauhan, has also stated before the Court that she has received a sum of Rs.50,000=00 (Rupees Fifty Thousand Only) from the appellant.

13. In view of what is stated above, the appeal will have to be partly allowed.

For the foregoing reasons, the appeal is partly allowed. The conviction of the appellant recorded under Section 498-A IPC is hereby set aside. The conviction of the appellant under Section 325 IPC recorded by the learned Additional Sessions Judge, Sabarkantha at Himatnagar, vide judgment dated February 22, 1991 rendered in Sessions Case No.2 of 1990 and sentence imposed on him for commission of said offence are hereby confirmed. However, the appellant is ordered to be released on probation of good conduct on his entering into bond in the sum of Rs.2,000=00 with two sureties of the like amount to the satisfaction of the trial Court, to appear and receive sentence when called upon during the period of two years. In the meantime, the appellant is directed to keep the peace and be of good behaviour. The appellant is warned that if this Court is satisfied that he has failed to observe any of the conditions imposed on him, the Court will have no option, but to issue a warrant for his arrest to lodge him in the jail so that he undergoes the punishment imposed on him by the trial Court for commission of offence punishable under Section 325 IPC. Muddamal to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(J.M.Panchal, J.)

Rajendra